

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Minnesota Chapter of	)	
Associated Builders and	)	File No. 24-CV-536
Contractors, Inc., National	)	(KMM/ECW)
Federation of Independent	)	
Business, Inc., and Laketown	)	Minneapolis, Minnesota
Electric Corporation,	)	September 16, 2024
	)	1:57 p.m.
Plaintiffs,	)	
	)	
vs.	)	
	)	
Timothy James Walz, in his	)	
official capacity as Governor	)	
of the State of Minnesota,	)	
Keith Ellison, in his official	)	
capacity as Attorney General	)	
of State of Minnesota, Nicole	)	
Blissenbach, in her official	)	
capacity as the Commissioner	)	
of the Minnesota Department of	)	
Labor and Industry,	)	
	)	
Defendants.	)	

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BEFORE THE HONORABLE KATHERINE M. MENENDEZ  
UNITED STATES DISTRICT COURT JUDGE  
**(MOTION HEARING)**

Proceedings reported by certified stenographer;  
transcript produced with computer.

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1                                   P R O C E E D I N G S

2                                   IN OPEN COURT

3  
4                   THE COURT: Welcome, everyone. We are here for a  
5 first hearing on a second motion related to dismissing in  
6 this matter. Let's get appearances on the record, first on  
7 behalf of the plaintiffs.

8                   MR. REVNEW: On behalf of the plaintiffs, Tom  
9 Revnew, appearing with my co-counsel, Kurt Erickson.

10                  THE COURT: All right. Great. Welcome to both of  
11 you. You've been around a long time. I'm surprised you  
12 didn't stand up.

13                  MR. REVNEW: I apologize, Your Honor.

14                  THE COURT: Don't worry about it. My whole career  
15 was in federal court, so the whole idea of ever sitting in  
16 court, I didn't even know that was a thing until I started  
17 working with some people who would come over from state  
18 court. I'm just giving you a little grief.

19                  And are you going to be arguing, sir?

20                  MR. REVNEW: I am, Your Honor.

21                  THE COURT: Great. Thank you.

22                  And here on behalf of the defendants.

23                  MR. PLADSON: Nick Pladson and my colleague, Ben  
24 Harringa.

25                  THE COURT: Okay. Great. And are you going to be

1 arguing, Mr. Pladson?

2 MR. PLADSON: Yes.

3 THE COURT: Thank you.

4 Let's go ahead and get started. So my hope for  
5 today's argument is that we can focus on any things that  
6 have changed since the last time we had this conversation  
7 and really kind of focus in on any new case law or new  
8 authority that anyone would like to draw to my attention and  
9 certainly the changed and evolved factual landscape.

10 I would like our conversation to include all of  
11 the things that are now before me, so both the amended  
12 complaint and the supplemented complaint. And I didn't look  
13 today. There's nothing new?

14 MR. PLADSON: (Shakes head.)

15 THE COURT: Okay. So I'd just like to have a  
16 conversation about that.

17 It is my intention to very likely rule from the  
18 bench today because I'd like to get this matter tied up.

19 So let's go ahead and get started, and I think  
20 I'll begin with you, Mr. Pladson, if you don't mind coming  
21 to the podium.

22 MR. PLADSON: Good afternoon, Your Honor.

23 THE COURT: Good afternoon. How are you?

24 MR. PLADSON: I'm all right.

25 THE COURT: So we are in factual attack land



1 again, correct?

2 MR. PLADSON: Correct.

3 THE COURT: That means you don't get the normal  
4 benefit of -- or that the plaintiffs don't get the normal  
5 benefit of assuming that the facts in the pleading are  
6 correct as to this question, right?

7 MR. PLADSON: That's right.

8 THE COURT: Tell me how you think I assess that,  
9 what difference you think that makes to the calculus.

10 MR. PLADSON: Well, I think the calculus, you have  
11 to look at what facts have been submitted and properly  
12 either authenticated or submitted and are admissible for  
13 consideration at this juncture. Right now we have  
14 affidavits regarding two statements made by Governor Walz  
15 that are in the record, and I don't dispute that those  
16 are -- they are what they are.

17 THE COURT: You're not raising an evidentiary  
18 challenge to the fact that these things have been said.

19 MR. PLADSON: No, not at all.

20 And the other thing, though, is that there aren't  
21 any other statements of, you know, admissible facts in the  
22 record. Right now we've got an unverified complaint, which  
23 is insufficient to oppose a dispositive motion.

24 THE COURT: Is this in your brief?

25 MR. PLADSON: Yep.

1 THE COURT: Okay. So what would it need to do to  
2 be verified and sufficient to avoid a motion?

3 MR. PLADSON: Well, I think in this context, they  
4 would have to submit evidence that they have -- they, the  
5 defendants -- or the plaintiff, excuse me, have been  
6 threatened or that the defendants here are about to commence  
7 proceedings to enforce the act against them specifically.

8 THE COURT: Oh, I understand what you think the  
9 showing has to be. Are you arguing that I can't consider  
10 anything -- so, for instance, I've got the allegations in  
11 the complaint that include the amendment to the law and the  
12 requirement of the website notifying people to hang posters.  
13 You agree I can consider that?

14 MR. PLADSON: You can consider that. I think that  
15 exists outside of the -- it's a matter of public record what  
16 the law is and what the amendment is and what has transpired  
17 there. I think where the factual deficiencies are are with  
18 what the plaintiffs have demonstrated as to themselves.

19 THE COURT: And tell me what you think -- you mean  
20 you think that this factual record that I have before me  
21 isn't enough to show threatened enforcement.

22 MR. PLADSON: Yes, that's exactly right.

23 THE COURT: But you're not asking me to hold an  
24 evidentiary hearing to require them to introduce, say, the  
25 new website, the Walz tapes, any of that?

1 MR. PLADSON: No. We're fine with those being in  
2 there. They speak for themselves.

3 THE COURT: Okay. I'm just trying to make sure we  
4 are all in agreement about what the record before the Court  
5 is and we're talking about the significance or the weight to  
6 afford to that record, right?

7 MR. PLADSON: That's right.

8 THE COURT: Very good. So tell me why you think  
9 the Walz speeches don't matter.

10 MR. PLADSON: They don't contain a threat of any  
11 kind. They simply --

12 THE COURT: What about, "You'll go to jail"?

13 MR. PLADSON: It's inaccurate. It's not true.

14 THE COURT: I recognize that, but it's also far  
15 harsher than the reality of remedy that's available. I  
16 mean, threat of enforcement, why doesn't that count?

17 MR. PLADSON: Number one, it's not threatened  
18 towards these plaintiffs, so that's part of our argument.

19 Number two, the governor has no connection with  
20 the enforcement of the law. He's charged with ensuring that  
21 the laws are faithfully executed under the state  
22 constitution. He has no specific or even general authority  
23 to enforce Section 181.531 or any of its parts. And there's  
24 no indication that any of the other things that might have  
25 happened that could get, you know, his hands deeper involved

1 in this case, such as a directive to a cabinet member or a  
2 directive to the attorney general, there's no evidence that  
3 any of that has happened or that he's taken any of those  
4 steps. All we have are these two statements, these sort of  
5 soapbox campaign speeches, essentially.

6 THE COURT: What about him saying, I got sued for  
7 this; there's nothing I'd rather get sued for? That, you  
8 know, really intimately kind of ties himself up with the law  
9 and, frankly, recognizes that there's a lawsuit about this  
10 law that he's kind of saying, bring it on, and yet you're  
11 standing here saying, do not bring it on.

12 MR. PLADSON: Well, I'm saying that he is not a  
13 proper defendant in this case because he has no connection  
14 to actually enforcing this law. So let's say that we go  
15 forward and the Court is about to enter an injunction of  
16 declaratory relief. What would the injunction do to  
17 Governor Walz? It would have to apply to him in some way  
18 that stops him from doing something that he's allowed to do.  
19 There's nothing that he's allowed to do under the state law  
20 or that he's even shown an indication of that would connect  
21 him with the enforcement, it would be purely illusory.

22 And so when we're looking at the remedies and who  
23 the proper parties are here, I think you need to look at  
24 what the action is that they otherwise could take that the  
25 injunction would do to either prevent or limit or modify.

1 THE COURT: So in *Whole Woman's Health*, one of the  
2 things the Court grappled with at length is the extent to  
3 which the various defendants or hypothesized defendants were  
4 appropriate defendants. And the Court landed on these  
5 licensing agents who had, arguably, pretty tangential, if  
6 any, tie to enforcement of the law, and the Court found that  
7 that was enough to create a connection.

8 Help me understand why that doesn't strengthen the  
9 claim that Governor Walz is, at least at this stage where he  
10 retains the ability, for instance, to instruct his  
11 commissioner to take action that's consistent with his  
12 campaign speeches, discipline his commissioner for not  
13 taking action that's consistent with his campaign speeches,  
14 where is the daylight between Governor Walz and the  
15 licensing agents in *Whole Woman's Health*?

16 MR. PLADSON: I think in *Whole Woman's Health*,  
17 we're on a 12(b)(6). That's what they confronted there.  
18 Here, we're on a 12(b)(1). We're looking at the fact of the  
19 matter and what the connection is. And here there is no  
20 steps that have been taken to create a connection.

21 You know, one of the arguments is that he could  
22 hire his own attorneys if he had a disagreement with the  
23 attorney general. He hasn't done that. There's no evidence  
24 that that's imminent or forthcoming, much less that he could  
25 enforce that specific portion of the law under that

1 particular provision should there be a conflict between  
2 himself and the attorney general.

3 I also think that in that case in particular, when  
4 *Whole Woman's Health* was remanded to the Fifth Circuit, they  
5 then certified the question to the Louisiana Supreme Court  
6 or maybe it's the Texas Supreme Court, whichever one --

7 THE COURT: Texas.

8 MR. PLADSON: Yeah. And they determined that  
9 there wasn't, in fact, a connection. So looking at more of  
10 a merits factual question that the licensing officials  
11 weren't, in fact, the proper parties to be sued or to be  
12 defendants for that. So that's sort of how that case ended  
13 up playing out.

14 THE COURT: Thank you. One of the things that I  
15 think is interesting in the language about the *Ex parte*  
16 *Young* doctrine is it always uses the word "threaten," and  
17 I'm sort of struggling with what that means when it comes to  
18 Governor Walz because he can be heard to sort of be  
19 threatening enforcement of this law. He's bragging about  
20 it, and he is saying, if you run afoul of this law, you will  
21 go to jail. It feels threaty. But in the language of *Ex*  
22 *parte Young*, the threat tends to be read hand in hand with  
23 enforcement, threatened to enforce. So I'm trying to  
24 decide -- there are places, though, that when you read the  
25 standard articulated, it includes to "threaten or enforce,"

1 so threatening is enough.

2 And that was a big warmup to the observation that  
3 in the First Amendment context, we always have concerns  
4 about chilling, so that threats, even when more remote or  
5 tethered to less robust ability to enforce, has the effect  
6 of chilling.

7 And then we have the overlay of a private cause of  
8 action statute, which is what caused Chief Justice Roberts,  
9 I think such agita in *Whole Woman's Health*, is that you have  
10 a statute that has an enforcement mechanism that drives  
11 around some of the traditional actors in enforcing laws.

12 So tell me what you think I do with that and with  
13 the idea of threats and chilling, aside from the specific  
14 initiation of an enforcement action.

15 MR. PLADSON: I think the concept of chilling is  
16 appropriate in the Article III standing context, but it's a  
17 concept that is not applicable to the *Ex parte Young*  
18 standard. And as we know from *Freeman* --

19 THE COURT: Do you have any case law for that  
20 idea?

21 MR. PLADSON: Yes.

22 THE COURT: I mean, I do see that it arises in  
23 that context, but do you have any case law drawing that  
24 line?

25 MR. PLADSON: Well, *Freeman vs. RFL*, is Republican

1 Farmer Labor Party of Minnesota, this case has been up and  
2 down to the Eighth Circuit a couple of times, and in both  
3 the district court decisions from Judge Tostrud, they  
4 discuss how the imminent standard is higher for an *Ex parte*  
5 *Young*. The Eighth Circuit recognized an imminence of threat  
6 that is much higher. You've got to meet a higher standing  
7 than just plain Article III standing.

8 So it would be -- the most recent one would be  
9 Judge Tostrud's district court decision from I think 2022,  
10 after the first remand.

11 THE COURT: 2022 is the Eighth Circuit's decision.  
12 So then he got another decision now?

13 MR. PLADSON: '23, yeah.

14 THE COURT: Okay.

15 MR. PLADSON: And incidentally, it was appealed  
16 again and affirmed in July by the Eighth Circuit.

17 THE COURT: Okay. Thanks. That's a good answer.

18 You don't seem to dispute, particularly, that  
19 Attorney General Ellison could be an appropriate defendant  
20 if he had threatened action or was taking enforcement  
21 action?

22 MR. PLADSON: Yes. I think it's clear the statute  
23 gives him authority to do that if he chose to do so.

24 THE COURT: And then Commissioner Blissenbach is  
25 the sort of in between?



1 MR. PLADSON: Right.

2 THE COURT: You'd concede that there's all kinds  
3 of duties that the statute has given her related to, if not  
4 directly enforcing in terms of bringing a lawsuit, certainly  
5 encouraging enforcement or doing things that have to do with  
6 the enactment of the law.

7 Tell me why that isn't enough. Why do we have to  
8 hue, in this era -- no disrespect to legislatures intended,  
9 but they are clearly learning to carve statutes to avoid  
10 pre-enforcement lawsuits. I think it's kind of hard to deny  
11 that. And in that era, why isn't it enough to strike as  
12 actionable all of the trappings that go around a traditional  
13 enforcement action but aren't that traditional, "I'm going  
14 to bring a lawsuit" or "I'm going to enjoin you." Instead,  
15 it's advertising. It's referring people to attorneys. It's  
16 inspecting properties with or without advance notice. It's  
17 running a website telling people what their rights are.  
18 It's doing all of the things to facilitate and elevate those  
19 private rights of action, but it's not being on the front of  
20 the V.

21 So help me understand why you still think  
22 Blissenbach isn't an appropriate defendant.

23 MR. PLADSON: Right. Well, if you look at the  
24 *Balogh vs. Lombardi* case from the Eighth Circuit -- I think  
25 it's 2013 or '15; it's in the briefs -- we have a situation

1       there where the bureau -- the director of the Bureau of  
2       Prisons is appointing a panel, and he's engaged in selection  
3       of individuals who will be on this panel regarding -- I  
4       think it's carrying out the death penalty or certain  
5       determinations, and there's a law that precludes individuals  
6       from disclosing information about who those individuals are,  
7       and those panelists have a right of action if somebody  
8       discloses.

9               Now, they attempted to -- ACLU or somebody was  
10       attempting to sue the governor -- or excuse me, the director  
11       of the prisons for his connection to this because but for  
12       him appointing people, there wouldn't be individuals there  
13       to enforce this.

14              And here, I think what the Court says is that that  
15       type of administrative or ministerial work in implementing  
16       the statute is not the type of enforcement that is  
17       envisioned by *Ex parte Young*, and it's taking action to  
18       actually bring about or coercing change forcibly, you know,  
19       an affirmative step to do so.

20              Now, here, the DLI commissioner -- this is not the  
21       only law that the DLI commissioner has this authority over.  
22       She has general authority over five or six different  
23       chapters of Minnesota law, so effectively hundreds of laws.  
24       She provides information about many laws, including those  
25       she doesn't enforce. That doesn't make her a proper

1 defendant for the federal laws that are listed on the  
2 website.

3 She refers people to attorneys if they call her,  
4 but it's primarily -- to be clear, it's not saying, go talk  
5 to an attorney. It's, I can't provide you legal advice; you  
6 know, we are not taking claims here; we're not --

7 THE COURT: Well, it's actually in the statute  
8 that they will refer to attorneys, right? It's not just,  
9 oh, I can't answer this call, you've got to call a lawyer,  
10 my standard answer when I make the mistake of answering my  
11 phone. It is actually more than that. One of the things  
12 she does is channel people to attorneys through whom they  
13 can vindicate their right.

14 MR. PLADSON: Sure. It's actually not in the  
15 statute. Where you find that -- and this is where I was  
16 getting clever was submitting exhibits -- but the  
17 legislative history, when the law was passed in 2023 --  
18 you'll see these attached in our first round of briefing --  
19 the DLI commissioner was asked for input on how this law  
20 would affect their operations. The commissioner that -- the  
21 agency responded that we don't believe we have enforcement  
22 authority over this; if people call us, we will simply refer  
23 them to attorneys. Sort of not our -- not our bailiwick  
24 here.

25 THE COURT: Got it.

1 MR. PLADSON: Get legal advice elsewhere.

2 So that is the extent of it, so I don't want that  
3 to be overstated.

4 THE COURT: Thank you. So you don't think that  
5 the website requiring posters is part of an enforcement  
6 action here? I mean, the case law from *Minnesota RFL vs.*  
7 *Dayton, Care Committees I and II, Whole Woman's Health,*  
8 other cases, the case law includes, you don't need to be the  
9 primary enforcer; you don't need to be the exclusive  
10 enforcer; there just must "be some connection," right? I've  
11 drawn those from multiple sources, but they don't require  
12 the best, the only, the absolute, the sole. And through  
13 those together, you can imagine kind of a patchwork: This  
14 person is involved in this way, this person is involved in a  
15 different way.

16 So why don't things like running a -- putting on a  
17 website that you have to put up posters telling people that  
18 they can't be required to attend these meetings and telling  
19 people what their rights are if they are required to attend  
20 these meetings, why isn't that part of a connection between  
21 the defendant and enforcement of the law?

22 MR. PLADSON: So with respect to the first prong  
23 of the *Ex parte Young* standard, I think that certainly comes  
24 closer, and I think that was important for us to notify the  
25 Court back in May of the change.

1 I think when you look at that particular  
2 provision, it simply requires the DLI commissioner to create  
3 the notice -- notice of rights poster. The DLI commissioner  
4 creates many other notice of rights posters. It doesn't  
5 make them connected to the enforcement of the law simply  
6 because when you look at that subdivision, Subdivision 3 of  
7 the law, the new amendment when it becomes effective next  
8 month, when you look at that subdivision, it simply requires  
9 her to create a poster. It doesn't say anything about her  
10 requirement to enforce that law or go out and investigate.

11 Now, in her affidavit, she disclaims any intent to  
12 investigate or enforce the notice posting requirement as  
13 well, and so --

14 THE COURT: What's the point of having this law if  
15 its primary actor is refusing to enforce it?

16 MR. PLADSON: Well, it's not the primary actor.  
17 The primary mechanism for enforcement is the public through  
18 the right of action. There's not an administrative sort of  
19 prerequisite investigation like you might have at EEOC or  
20 something where you have to go to an administrative agency  
21 for an investigation first. You can go right to court.

22 And so what the officials here have chosen to do  
23 is to see, you know, to what extent is this private right of  
24 action going to be sufficient to carry out the purposes?  
25 Why do we need to invest state resources enforcing this

1 particular law at this time? That's within their discretion  
2 as state officials to choose and prioritize different  
3 things.

4 And I think in this case, particularly where  
5 they've disclaimed any interest to do so, you know, any  
6 particular official who's in that position is going to have  
7 different priorities, is going to have different interests  
8 and going to have different plans for what they're going to  
9 do in office. And I think the prudent decision that they  
10 believe they've made is, let's see what kind of a problem  
11 this is, and if the private right of action is insufficient  
12 to address it, then we can maybe revisit whether we need to  
13 take a more bold step or whether the AG, for example, needs  
14 to take more aggressive action.

15 THE COURT: Let me ask a theoretical, academic  
16 type of question here, as you know I want to do. One of the  
17 things I have been thinking a lot about in this new  
18 legislative model with private right of action is that if we  
19 get to the merits of the constitutionality of this law now  
20 in this lawsuit, we will have excellent lawyers on both  
21 sides, we will have somebody whose job is to defend the  
22 constitutionality of a statute and understands it very well.

23 If we continue to say, oh, no, it's a private  
24 right of action, there can never be *Ex parte Young*  
25 satisfying pre-enforcement lawsuit. We have to wait until

1 an employer takes action, terminates or disciplines an  
2 employee, gets sued, and then see how well that lawyer  
3 versus that employer can litigate this important  
4 constitutional issue.

5 One of the things that I feel like was going on  
6 with the Court in *Whole Woman's Health* is kind of a concern  
7 that if you -- you're avoiding -- you are essentially  
8 evading constitutional review or you risk evading  
9 constitutional review. So then it requires -- that employer  
10 might be a small unsophisticated employer -- to understand  
11 that they can bring a First Amendment challenge in an  
12 employment case.

13 Isn't this better?

14 MR. PLADSON: No, because we don't have -- what is  
15 functional -- what *Ex parte Young* requires is sort of the  
16 functional equivalent of ripeness. And here, because we  
17 have no threatened action, we have just the hypothetical of  
18 how this law might apply. And the Court in *Whole Woman's*  
19 *Health* reiterates that there's no unequivocal right to a  
20 pre-enforcement challenge.

21 And just because, you know, the traditional route  
22 is to raise it as an affirmative defense -- and I will say  
23 that in Minnesota, if it is raised as an affirmative defense  
24 and somebody challenges it, they've got to notify the  
25 attorney general so the attorney general can choose to

1 defend the law. And in that context, you have an actual  
2 fact pattern to work with. We're not talking in the  
3 theoretical or the metaphysical about whether this -- you  
4 know, how does this play out and how does the First  
5 Amendment intersect with this.

6 And so all we're simply saying is that at this  
7 point under *Ex parte Young*, this is not ripe for federal  
8 court adjudication. It doesn't mean there couldn't be a  
9 cause of action in state court. It's possible. I don't  
10 specifically know, and I'm not going to go over my skis here  
11 in trying to describe how it might come up. But I think  
12 here, where you've got nobody who has expressed a threat or  
13 an intent to -- who has a connection to the law, that has  
14 not expressed an intent or threat to commence proceedings to  
15 enforce it, you don't have a ripe action under *Ex parte*  
16 *Young*. And that's not the language they use. That's  
17 conflating it with ripeness and --

18 THE COURT: Yeah, yeah, but it's an interesting  
19 analogy.

20 MR. PLADSON: You've got to have an imminent  
21 threat, and the Eighth Circuit says that imminent threat has  
22 to be something more than ripeness under Article III. So  
23 that's where we land.

24 THE COURT: Okay. What else do you want me to  
25 know?



1 MR. PLADSON: I would like you to grant our motion  
2 to dismiss entirely.

3 THE COURT: I didn't mean to be flip. Is there  
4 anything else you want to share that you think I am  
5 misperceiving or that has changed since our last  
6 conversation?

7 MR. PLADSON: No, I don't think there's been  
8 anything -- well, the last conversation was before the  
9 statute was amended. We think that still doesn't change the  
10 ultimate outcome. This case fails on prong two of *Ex parte*  
11 *Young* under any analysis, whether you buy my argument about  
12 Commissioner Blissenbach or not, that there's no imminent  
13 threat of enforcement here.

14 THE COURT: Can I ask you one last question about  
15 the Governor Walz thing? You raise an interesting point  
16 about thinking of the connection to the statute through the  
17 lens of declaratory relief or an injunction or something  
18 like that, and I'll be the first to admit that I'm just  
19 starting to understand how difficult it is to actually grant  
20 injunctive relief, to figure out what that looks like, what  
21 it means.

22 But what difference does it make, as a practical  
23 matter, if -- let's hypothesize that I allow this case to go  
24 forward and that Commissioner Blissenbach and Attorney  
25 General Ellison are easy to -- more obvious to remain in the

1 case but that Governor Walz is more difficult and I am on  
2 the fence.

3 If I allow him to remain in the case and it turns  
4 out he's unaffected if the plaintiffs are successful and if  
5 there is injunctive relief, then the injunction just doesn't  
6 tie his hands in the end. If I determine that there is  
7 action he could take, that his hands should be tied if the  
8 plaintiffs are successful and if there's injunctive relief,  
9 then I include it.

10 Why does it matter? And I'm not talking Law  
11 Review article. Why does it matter practically in this  
12 case?

13 MR. PLADSON: If I understand the question  
14 correctly, and correct me if I'm wrong, but if he does not  
15 have the ability to -- he doesn't have the ability to carry  
16 out what is specifically permitted to be enjoined under  
17 *Ex parte Young* and sovereign immunity, which is the direct  
18 enforcement. I take the point earlier about, you know, role  
19 in the process and you could have, say, two entities or two  
20 officials who have some, you know, complementary roles in  
21 the enforcement mechanism, but he has no role at all. You  
22 would not be able to bind him in any sort of action  
23 whatsoever. The declaration would be either -- the  
24 injunction would be illusory.

25 And I think there's a helpful analog to --

1           THE COURT: But what difference does it make now?  
2       I mean, that's what I'm trying to sort out. So let's say  
3       you lose and I leave him in, and at the end, you're right.  
4       Let's say also the plaintiffs win on the merits, which I am  
5       not at all presupposing. And then it comes time to draft  
6       that injunction and I'm like, oh, yeah, there's really  
7       nothing to tie Governor Walz's hands with. And I'm not  
8       being cavalier about this. But he's got the same set of  
9       lawyers. It's no extra skin off our governor's nose whether  
10      he is one of these three defendants or not. Why does this  
11      matter in the universe?

12           MR. PLADSON: Well, because under the Eleventh  
13      Amendment jurisprudence, state officials have a  
14      constitutional right to not be drug into federal court, and  
15      federal court is court of limited jurisdiction, and this --  
16      subject matter jurisdiction, Eleventh Amendment questions  
17      are supposed to be decided early on to prevent state  
18      officials from being -- sort of the flowery language is  
19      ensnared in ongoing litigation and that sort of thing, these  
20      concepts that have been reiterated throughout the last  
21      century.

22           But that's why. If he has not got a sufficient  
23      connection, and we don't think he does, then he deserves his  
24      right to be out of the suit -- the Office of the Governor  
25      deserves to be out of the suit.

1 THE COURT: Is there nothing that he could say in  
2 a speech that would put him in this suit?

3 MR. PLADSON: I think it's -- well --

4 THE COURT: I mean, "You're going to jail" isn't  
5 enough?

6 MR. PLADSON: No, because, number one, it's not  
7 true, and number two, it doesn't -- it wasn't directed at  
8 any particular individual. It wasn't directed at the  
9 plaintiffs. The plaintiffs haven't indicated that they're  
10 further -- or provide any admissible evidence that they've  
11 felt threatened or chilled in any manner, and he doesn't  
12 have a connection to the enforcement. If he said, tomorrow  
13 morning I'm going to go out and I'm going to direct  
14 Commissioner Blissenbach to start investigating and I'm  
15 going to ask Governor Walz to -- Attorney General Ellison --  
16 I've got too many clients here -- Attorney General Ellison  
17 to reconsider his statement that he has no intent to enforce  
18 it and we're going to push it, I think that's a much closer  
19 question. I think it's much harder for us to say that that  
20 involvement is not enough.

21 I still think there's a question with whether  
22 functionally he could, absent somebody else -- like without  
23 Commissioner Blissenbach, he can't investigate the law. He  
24 can appoint the DLI commissioner, just like the director in  
25 *Lombardi*.

1 THE COURT: And he can fire Commissioner  
2 Blissenbach if he continues to emphasize this in his own --  
3 forget politics -- in his own set of policy priorities. If  
4 he continues to emphasize this and she continues to say, I'm  
5 not going to inspect anyone, he could fire her.

6 MR. PLADSON: Right.

7 THE COURT: Okay.

8 MR. PLADSON: And that's not the facts that are  
9 here, though. We don't have any facts that he's threatened  
10 or that he's directed --

11 THE COURT: Right, but he can.

12 MR. PLADSON: Yep.

13 THE COURT: He can. He could remove her. She is  
14 appointed at his discretion.

15 MR. PLADSON: And I think, going back to *Lombardi*,  
16 she's the one that still has the -- to the extent that there  
17 is -- and I know we disagreed about whether she's close  
18 enough, but assuming she is, she is the one that has that  
19 right to do the investigation. He still doesn't. He gets  
20 to a point, but he still isn't the person.

21 THE COURT: And he gets to terminate.

22 MR. PLADSON: And he gets to terminate, yeah. But  
23 then he's got to appoint somebody else and got to make sure  
24 that they're going to go forward, and they must actually  
25 threaten or be about to commence proceedings under prong

1 two.

2 THE COURT: Okay. Thank you very much.

3 MR. PLADSON: Thank you.

4 All right. Mr. Revnew. Give me one second. Let  
5 me get my ducks in a row here.

6 Go ahead. Same lens. I still know all the stuff  
7 I learned last time, and I guess our focus should be more on  
8 what's changed or what's grown or what's evolved.

9 MR. REVNEW: Yeah. Good afternoon, Your Honor.

10 The Court is well aware of the new facts. And  
11 when we first filed our complaint, we did not have the  
12 existing statement by Governor Walz that you go to jail if  
13 you violate this law.

14 THE COURT: Does it matter that that's hogwash?  
15 No disrespect to anyone with the term "hogwash," but nobody  
16 is going to jail, no matter who violates this law.

17 MR. REVNEW: I think it does matter, Your Honor.  
18 We are talking about a First Amendment issue here, and it is  
19 an issue with regard to -- if you point discrimination and  
20 we have the chief executive of the State of Minnesota saying  
21 that if you engage in this conduct, you will go to jail, the  
22 average person in the general public has no idea whether  
23 they're going to go to jail or not. That in and of itself  
24 is, in fact, a threat. So I think it does matter that he  
25 made that comment.

1           And I understand defendants' counsel is claiming,  
2       well, it's a misstatement of what the law provides, but it  
3       is still a threat. And it shows an intent to enforce the  
4       law, which is what we're looking at, and an intent to  
5       enforce the law.

6           THE COURT: What about the admonitions including  
7       from *Whole Woman's Health* but also I think from Minnesota,  
8       *RFL vs.* -- I guess it's *Freeman*, that it's not enough just  
9       to have a theory of chilling, that *Ex parte Young* isn't just  
10      about a theory of chilling and that it has to be more in --  
11      as to any constitutional right. And I think it's *Whole*  
12      *Woman's Health* that lists the First Amendment but also other  
13      constitutional amendments and says that as to any of them,  
14      it's not enough to just say, I'm nervous about exercising my  
15      right because this might happen. That isn't enough. There  
16      has to be more.

17           MR. REVNEW: Well, I think there is more here.  
18      And I go back to the sitting governor's statement that "You  
19      will be arrested."

20           And it goes beyond that, Your Honor, because in  
21      this instance, the governor knew that this case was ongoing.  
22      The governor knew that the complaint -- this Court allowed  
23      us to amend the complaint to name Governor Walz as a  
24      defendant to this case.

25           And in addition, Your Honor, the governor would

1 know as to the nature of this case that he was served, that  
2 there was a threat, that the plaintiffs perceived that he  
3 was threatening enforcement of this case.

4 Despite that, the governor does not sign a  
5 declaration saying, I have no intent and will never enforce  
6 this statute. He didn't say that. In fact, he said the  
7 opposite, where roughly a month ago, August 14th, he stood  
8 up in front of a group and he doubled down. And it wasn't  
9 that I'm going to disclaim that folks would be arrested. He  
10 doubled down and said, the last time I talked about captive  
11 audience speeches, I was sued and it was the best thing that  
12 ever happened to me and we're going to continue to ban those  
13 captive audience speeches.

14 THE COURT: Does it matter that he has actually no  
15 authority to do any of that? That he doesn't have the  
16 authority to send someone to jail? That he doesn't have the  
17 authority to ban it? That's something the legislature did.  
18 And that he's not the actor who has any enforcement  
19 authority?

20 MR. REVNEW: Well, I think that the question  
21 assumes something that I disagree with, and that is I do  
22 think Governor Walz does have an enforcement mechanism here.  
23 And we can piece it all together, Your Honor, with regard  
24 to, first, we can start with the Minnesota Constitution that  
25 he has the authority that he needs to ensure that the laws



1 are faithfully executed. And I'll concede that that in and  
2 of itself is not going to be enough, Your Honor.

3 But two, under the Minnesota statutes, he has the  
4 right to employ counsel to act in any action or proceeding  
5 if the attorney general is in any way adverse to the State.

6 So you have this dilemma where you have the  
7 attorney general saying, I'm not going to enforce, which is  
8 directly adverse to what Walz is saying, that he wants to  
9 enforce it. And so I think you have to tie in Minnesota  
10 Statute Section 806, tie that together with his  
11 constitutional duties, but also tie in --

12 THE COURT: We have to be careful though, right,  
13 sir, because -- putting aside the speeches for just a  
14 moment, your sewing together different important statutory  
15 and constitutional provisions would apply to any statute and  
16 would mean that any statute that had a risk of First  
17 Amendment chilling would be amenable to a pre-enforcement  
18 lawsuit, regardless of expressed intent to enforce or  
19 bringing enforcement actions, based instead on the strength  
20 of the ability to enforce. And I think the law is pretty  
21 clear that something more is required. Otherwise, Chief  
22 Justice Roberts wouldn't have reminded us that chilling  
23 alone isn't enough.

24 So isn't there some risk when you are pointing to  
25 things in the statute that require enforcement that it ends

1 up kind of vitiating the imminent threat part of *Ex parte*  
2 *Young*?

3 MR. REVNEW: So, Your Honor, I think there's one  
4 important factor here. In all of the cases that have been  
5 presented to the Court in the briefing, there is not one  
6 case where a governor has made the statements that Governor  
7 Walz has made. Not one case. Pretty egregious statements  
8 that he's going to shut down free speech, because what does  
9 the law provide? The law provides that you can't talk about  
10 political speech or religious speech, and political speech  
11 is very broadly defined.

12 And I hear what you're saying, Your Honor, but in  
13 the cases that are cited -- I believe the defense counsel  
14 cited the Eighth Circuit case in *Church*. And as you dig  
15 into that particular case in *Church*, it goes on and it cites  
16 another Eighth Circuit case, *Citizens for Equal Protection*  
17 *vs. Bruning*, 455 F.3d. 859. And the Eighth Circuit in that  
18 case specifically said that general enforcement authority  
19 means that you have some connection if that authority gives  
20 the governor methods of enforcement. And what I submit to  
21 the Court here is that the statutory framework, the  
22 constitutional framework, gives Governor Walz the method of  
23 enforcement.

24 THE COURT: But that's not enough by itself,  
25 right? You would agree that just because he has the method,

1 if he's not acting on it, using it, or threatening it, the  
2 fact that he has the authority isn't enough. The fact that  
3 Attorney General Ellison has the authority, the fact that  
4 Commissioner Blissenbach has the authority, on paper that is  
5 not enough. Something more has to be present.

6 MR. REVNEW: So, Your Honor, I agree with you  
7 that -- I mean, when we're talking about *Ex parte Young*,  
8 it's a two-part analysis, right? Do you have the ability to  
9 enforce? And are you, in fact, threatening to enforce the  
10 law?

11 And I submit to the Court, as our briefs have laid  
12 out and our complaint has laid out, that all three  
13 defendants, Commissioner Blissenbach, Attorney General  
14 Ellison, and Governor Walz, they all have the ability to  
15 enforce, and there is a threat here.

16 And what I'd like to point out to the Court --  
17 because you asked me -- at the last oral argument, you had  
18 asked a question of me with regard to the declarations that  
19 were submitted. And within the declarations, the defendants  
20 state they have no present intent to enforce. And I believe  
21 as part of our discussion during the last oral argument, I  
22 believe the Court noted that, well, if we looked at *Care*  
23 *Committee*, in that case, the declarations actually had a  
24 little bit more, which said, "I will not enforce."

25 THE COURT: Right.

1 MR. REVNEW: And what I wanted to point out to the  
2 Court is that if we look at the *Freeman* case, and the  
3 *Freeman* case that was decided by the district court, so  
4 486 F.Supp.3d. 1300.

5 THE COURT: What's the date on that?

6 MR. REVNEW: 2020.

7 THE COURT: Okay. So this is before it went up to  
8 the Eighth?

9 MR. REVNEW: It's before it went up to the Eighth.  
10 But what I wanted to point out to the Court is in that case,  
11 the district court did look at the case that I mentioned  
12 during the last oral argument, the *UFCW vs. International*  
13 *Beef Processors*, 857 F.2d. 422, to say, I can, as a district  
14 court, ignore these declarations that don't contain the  
15 language. I have no intention -- or I will not enforce the  
16 statute ever.

17 THE COURT: But didn't the Eighth Circuit squarely  
18 disagree -- I mean, if not squarely disagree, the Eighth  
19 Circuit in the *Minnesota RFL vs. Freeman* case specifically  
20 said that a disavowal of future prosecution is not required.  
21 No present intention is enough.

22 MR. REVNEW: But, Your Honor, I think that's the  
23 point I'm trying to make --

24 THE COURT: Okay.

25 MR. REVNEW: -- which is there's a factual

1 distinction here, right? And *Republican Farmer Labor*  
2 *vs. Freeman*, you didn't have a governor who not once but  
3 twice made statements that were threatening in nature, and  
4 we do in this case.

5 And what I'm trying to point out to the Court is  
6 the district court acknowledged that it can ignore  
7 declarations based upon the factual layout of what has  
8 happened in a particular case.

9 And in this case, what I want to point out to the  
10 Court is not only did Governor Walz not submit a declaration  
11 saying he has no present intent to enforce and will never  
12 enforce, but the two other defendants doubled down and  
13 submitted the same declaration, "I have no present intention  
14 to enforce." It's wishy-washy. It's squishy.

15 And remember, the general public, when we're  
16 talking about a free speech right, when a sitting governor  
17 says you're going to go to jail, and you have the  
18 commissioner and the attorney general saying, well, I have  
19 no present intent to enforce, that really sends a bad  
20 message. In fact, I believe that the Court can ignore the  
21 declarations that have been submitted by the two other  
22 defendants, Attorney General Ellison as well as Commissioner  
23 Blissenbach.

24 THE COURT: Okay. What else? Anything else you  
25 want me to keep in mind? Answer one of -- that same

1 question that I subjected opposing counsel, Mr. Pladson, to.  
2 What difference does it make, as a practical matter -- let's  
3 hypothesize that I was going to deny the motion to dismiss  
4 as to Commissioner Blissenbach and Attorney General Ellison.  
5 What difference does it make if Governor Walz is in the  
6 case?

7 MR. REVNEW: Hypothetically speaking -- I mean,  
8 first, I believe that the governor should be in, so I'm  
9 taking your hypothetical question that the Court were to  
10 say, you know, it's too tenuous as far as a connection or  
11 there's no threat whatsoever. Regardless, Your Honor, we  
12 end up getting to the merits of the case, right, with regard  
13 to Nicole Blissenbach as well as to Attorney General Ellison  
14 and the constitutionality of the statute. So from a  
15 practical standpoint, I don't think it makes a difference.

16 THE COURT: Okay. Thank you. Anything else?

17 MR. REVNEW: No. Thank you, Your Honor.

18 THE COURT: Okay. Mr. Pladson, you want the last  
19 word?

20 MR. PLADSON: Sure. Just quickly, the fact that  
21 Governor Walz didn't submit a declaration I don't think  
22 matters. It's the plaintiffs' burden to prove subject  
23 matter jurisdiction here, and they have not submitted  
24 sufficient evidence.

25 Lastly, with respect to the RFL district court

1 case from 2020, that was a 12(b)(6) motion, and Judge  
2 Tostrud specifically ends his analysis on the first prong of  
3 *Ex parte Young*. So he is -- it doesn't matter for that  
4 stage, and we acknowledge that. That's why we brought the  
5 motion the way we did.

6 And then I would just caution any reliance on  
7 *Citizens vs. Bruning*, the Eighth Circuit case. I think if  
8 you follow the subsequent Eighth Circuit decisions, they  
9 identify a very unique situation there with the Nebraska  
10 Constitution, the gay marriage amendment and enforcement  
11 structure and they've cabined that sufficiently. So that's  
12 all I have.

13 THE COURT: Thank you. I am going to rule from  
14 the bench. And I am going to deny the motion to dismiss as  
15 to all three of the defendants. I am going to explain my  
16 ruling in detail.

17 I'm also denying the plaintiffs' request that I  
18 sua sponte grant summary judgment in their favor. That is  
19 premature. I have no briefing before me on which I could  
20 hang my hat, and we'll talk about next steps at the end of  
21 my explanation of my ruling.

22 I am doing this from the bench specifically  
23 because I don't want to continue to delay. In  
24 tongue-in-cheek candor, I worry that the factual landscape  
25 will continue to evolve and speeches will continue to be

1 made, and we don't need to continually talk about whether  
2 one or the other of these things has tipped us over into the  
3 appropriate land where the case can move forward.

4 So I appreciate the excellent briefing, and  
5 everybody is on the same page, more or less, about what the  
6 standard is.

7 Eleventh Amendment immunity is really important.  
8 I don't make light of it. It's part of why I have spent a  
9 lot of energy really thinking about these issues. And I  
10 really resist any hint that chilling alone is enough, and I  
11 resist any hint that if it involves the First Amendment, it  
12 doesn't matter if there's a threat to enforce. Nothing I'm  
13 saying should be taken to suggest that I'm weakening or  
14 intending to weaken these requirements.

15 But there is this expert -- I'm sorry, there is  
16 this exception under *Ex parte Young*, and I have to ask two  
17 questions: Is the relief sought prospective? And if there  
18 are officials with the ability to enforce that statute that  
19 either have threatened or are about to commence proceedings,  
20 then the exception to the sovereign immunity kicks in.

21 I've read the cases carefully, frankly, over and  
22 over again. I want to make a couple of preliminary  
23 observations.

24 This is a strange procedural posture in the case  
25 law because it is a factual attack. It is a motion to



1 dismiss, but it isn't a 12(b)(6), and that does make a  
2 difference in these decisions. That is what explains the  
3 difference between *281 Care Committee I* and *281 Care*  
4 *Committee II*. And I think it's part of what informed the  
5 Court in *Whole Woman's Health*, although I think we could  
6 have a three-day seminar on what the holdings of *Whole*  
7 *Woman's Health* actually are and how to apply them moving  
8 forward.

9           So I recognize this is a factual attack, and the  
10 claims in the complaint aren't entitled to deference and I  
11 have to look at evidence. But I also recognize that, you  
12 know, there are likely to be additional developments of  
13 facts about who does what with respect to the statute as the  
14 case moves forward.

15           So although I am not suggesting this is a  
16 preliminary facial ruling, I am observing that if the  
17 landscape should change, if new things come up about the  
18 applicability of the *Ex parte Young* exception, those can be  
19 re-raised. This door is not slammed. The Court has the  
20 obligation to keep its jurisdiction in mind at every stage.

21           So the first question I have to answer is whether  
22 there is a connection between the defendant and the  
23 enforcement of the law. And the case law teaches that it  
24 need not be an exclusive enforcement responsibility. It  
25 need not be the only official with a connection to the

1 enforcement of the law. It may not be the primary  
2 enforcement ability. In fact, if anything, *Whole Woman's*  
3 *Health* really brings that home. But there must be some  
4 connection.

5 And so based on my review of the same cases I'm  
6 going to repeat over and over, *Minnesota RFL*, *Care Committee*  
7 *I*, *Care Committee II*, and *Whole Woman's Health*, I am going  
8 to determine that all three of these defendants have an  
9 adequate connection to enforcement or threatening  
10 enforcement of the law.

11 Let's start with Governor Walz. Governor Walz can  
12 appoint and can remove Commissioner Blissenbach. That is a  
13 distinction from the *Balogh* case and I think from the *Church*  
14 case as well. I apologize if I'm mixing up my citations.  
15 It is something that makes this different from simply having  
16 appointing ability.

17 Governor Walz continues to make speeches  
18 celebrating the passage of the law but going a step further.  
19 It isn't just enough to say, this is an accomplishment  
20 during my administration of which I am very proud, we passed  
21 this law. It is going a step further and saying, and if you  
22 violate this law, you will go to jail.

23 It does seem that there is a disconnect between  
24 the actual sanctions for alleged violations of the law and  
25 what he made his speech about, but it nonetheless evinces a

1 commitment to enforcing the law and a threat of enforcing  
2 the law that is unique among all the cases that I could  
3 find. I've never seen a case where a defendant advocating  
4 for dismissal is simultaneously having the chief executive  
5 of the state threatening enforcement of the law. Making  
6 your jobs a little difficult, I realize, but it matters in  
7 this context.

8 I disagree that this is meaningless politics. I  
9 think it would be closer -- and I'm not saying you meant it  
10 was meaningless politics, but I disagree that there's an  
11 exception here for things that are said from the campaign  
12 trail. This particular combination of speeches is more than  
13 just celebrating the passage of the law or the good idea  
14 behind the law. It is threatening enforcement, and it is  
15 proudly mentioning that I'm going to keep talking about this  
16 even though I am getting sued for it. It elevates the  
17 robustness of the commitment.

18 I think it's interesting that this case law  
19 doesn't always just talk about imminent enforcement, as in  
20 we've gotten a call, they've executed a search warrant,  
21 they've brought a complaint. It also talks about threats,  
22 and this is as close to a threat in the case law as I have  
23 seen.

24 So even though I think Governor Walz has a less  
25 robust tie to the enforcement of the law, he has the most

1 robust tie to threatening to enforce the law, and he has a  
2 sufficient tie to enforcement of the law to make him an  
3 appropriate defendant.

4 This is the closest call of the three defendants,  
5 and I'm mindful of the wise council of defense counsel that  
6 if you can't think of how you would bind the defendant with  
7 injunctive relief, that could be an observation that he  
8 should not be an appropriate defendant. But here, there is  
9 enough of a showing of his connection to the enforcement and  
10 the threatening of the enforcement of the law, and he has  
11 demonstrated a unique interest in enforcing this law, such  
12 that things that might otherwise be dormant on the books,  
13 like the ability to fire the commissioner or the ability to  
14 take other action in enforcement of the law, are elevated in  
15 this case in a way they might not be.

16 I want to be very clear. I think that some of the  
17 argument from the plaintiffs here go too far and would make  
18 the governor or certain agents subject to the *Ex parte Young*  
19 exception simply because you can articulate an ability to  
20 enforce the law without actually any threatened enforcement.  
21 And I'm not suggesting that Governor Walz or any governor is  
22 always the appropriate defendant in a case like this. But  
23 here, those speeches, combined with the ability to remove a  
24 commissioner who might not feel as zealous about this law as  
25 he does, is enough to move forward.

1           With respect to Commissioner Blissenbach, I also  
2       find that the commissioner has an adequate tie to  
3       enforcement of the law. I think that this case law is going  
4       to continue to evolve as we have more cases that are  
5       designed for enforcement through a private right of action.  
6       That makes the role of the state executives different from  
7       simply being the person who brings the lawsuit, brings the  
8       criminal complaint, brings the enforcement action. But  
9       here, the statute is replete with examples of things that  
10      the commissioner does in support of the enforcement of this  
11      law, and there's no suggestion that it has to be simply a  
12      pure traditional prosecutorial authority to count as  
13      sufficient tie to the enforcement of the law. I'd point to  
14      *Doe vs. DeWine* and *Jones vs. Jegley*, J-E-G-L-E-Y, as well as  
15      *Whole Woman's Health*, in support of this observation.

16           I'd also note that the statute itself uses the  
17      term "enforcement," enforcement of this chapter by the  
18      department, and so that means something in the statutory  
19      scheme about her connection to the law.

20           The referrals to the attorneys, I think I had a  
21      slight misapprehension about how that worked, but certainly  
22      the website that's telling people to put up posters that  
23      advertise to the employees what the nature of their rights  
24      are under the law is an additional fact.

25           And then with respect to Attorney General Ellison,

1 I don't think there's any real dispute that he actually has  
2 enforcement ability, so as to prong one, that one is easier.

3 The second question then is, is there any threat  
4 of enforcement? There has to be more than just the ability  
5 to enforce. There has to be something else.

6 I'm going to note that I don't agree with either  
7 side's characterizations entirely of how to apply *Whole*  
8 *Woman's Health*. I feel like the defendants sort of want me  
9 to kind of disregard what it suggests for pre-enforcement  
10 litigation, and the plaintiffs want, even though they  
11 disavow this in their briefing very credibly, are really  
12 advocating for an application that heavily reduces the  
13 requirement that they're being threatened or imminent  
14 enforcement. But I think somewhere in the middle, *Whole*  
15 *Woman's Health* represents a shift in the application of *Ex*  
16 *parte Young*, or certainly could do so.

17 I note that the *Minnesota RFL* case involves a  
18 different statutory scheme and barely grapples with *Whole*  
19 *Woman's Health* and its impact on the questions there. It  
20 mentions it twice, once in a footnote and once in the body  
21 of the opinion, but it doesn't do the wrestling with the  
22 case that I think we've done here, and perhaps that's  
23 because it was so much more recent at the time.

24 The Chief Justice in *Whole Woman's Health* says  
25 that eight justices agree that *Ex parte Young* applies there

1 because there exists state executive officials who retain  
2 authority to enforce the law.

3 We have much more than that here. We have state  
4 executive officials who retain the authority to enforce the  
5 law in some way, and we have steps taken affirmatively  
6 toward executing that authority, including Commissioner  
7 Blissenbach's being instructed to put up the website and  
8 advertise for the posters, but also including the chief  
9 executives repeatedly talking about this law and threatening  
10 explicitly to enforce it.

11 I disagree that enforcement has as narrow a  
12 meaning as the defendants suggest, given the private right  
13 of action nature of this scheme, and Commissioner  
14 Blissenbach is already taking steps to do their part to  
15 enforce the scheme.

16 I also note that threatening and talking about  
17 enforcement goes an extra step, which is encouraging  
18 individual citizens in this private right of action to take  
19 their steps toward enforcing the scheme. That's where *Whole*  
20 *Woman's Health* and this case have more in common than either  
21 the *RFL* case or the *Care Committee 281* case. Although one  
22 of those does have the capacity for private right of action,  
23 it also has direct state enforcement possibility. This case  
24 is different. This statute is designed differently. I  
25 don't know yet if I'm convinced that this statute was

1 designed in this way specifically to avoid pre-enforcement  
2 litigation or because, as you say, thinking of a more useful  
3 allocation of resources, but I don't know that it matters at  
4 this stage.

5 I'll note that Attorney General Ellison has taken  
6 the least action but has the strongest connection with the  
7 enforcement of this statute. And, therefore, with the  
8 imminent threats related to enforcement, I find that there  
9 is enough for this litigation to proceed.

10 The third observation I want to make is that this  
11 is a First Amendment case. And in *Jones vs. Jegley*, which  
12 was an Eighth Circuit 2020 case, it rejected the argument  
13 that a plaintiff must first get prosecuted before  
14 challenging a First Amendment statute. And here, getting  
15 prosecuted is getting sued, given the statutory design, and  
16 the concern there was chilling speech. I don't agree that  
17 anytime a law has the effect of chilling speech, the  
18 Eleventh Amendment immunity issues go out the window. That  
19 can't be. Otherwise, we could never see the application of  
20 this in the context of the First Amendment, and we see this  
21 analysis over and over again in First Amendment cases. But  
22 here, there is something unique about public threats to  
23 enforce this law that has an extra concern for chilling.

24 I'm going to quote *NRA vs. Vullo*. "Ultimately,  
25 *Bantam Books* stands for the principle that a government



1 official cannot do indirectly what she is barred from doing  
2 directly. A government official cannot coerce a private  
3 party to punish or suppress disfavored speech on her  
4 behalf." It's not a perfect analogy for a lot of reasons,  
5 but it is instructive to me about the way the fact that we  
6 risk chilled speech here plays into the *Ex parte Young*  
7 analysis.

8 So I think I've explained my reasoning. I know  
9 you don't agree with it, Mr. Pladson. Is there anything  
10 else that needs explanation with respect to the motion to  
11 dismiss?

12 MR. PLADSON: I don't think so. I was going to  
13 raise a more pragmatic question about current events.

14 THE COURT: Okay. So lets get to that in just a  
15 second.

16 Any further explanation needed with respect to my  
17 ruling on the motion to dismiss?

18 MR. REVNEW: No, Your Honor.

19 THE COURT: Okay. I am not going to write an  
20 order. I'm buried in orders right now. I'll capture the  
21 fact of this in the minutes, but that's part of why I really  
22 prepared my thoughts in advance, so that you all could have  
23 a ruling right away.

24 Let's talk about next steps. So why don't you go  
25 ahead. Come on up to the podium and tell me what your

1 concerns are.

2 MR. PLADSON: One of my clients happens to be  
3 running for Vice President of the United States.

4 THE COURT: I've noticed.

5 MR. PLADSON: So should a month and a half from  
6 now, eight weeks, whatever it is, should that election  
7 happen and he will take office in January, now I think --  
8 you know, as you mentioned before, the facts on the ground  
9 are very much shifting and changing and he, if that happens,  
10 would not be the governor any longer. We would have a  
11 different governor, and my understanding would be that the  
12 threats no longer apply because they're not articulated by  
13 the same person.

14 I just wanted to raise that as a point of what is  
15 our -- in order to move forward --

16 THE COURT: So you're saying could you renew the  
17 motion to dismiss once you have a different governor who  
18 might not be making speeches?

19 MR. PLADSON: Yes, and I probably would. But I  
20 wanted to see pragmatically if -- were we to agree to a stay  
21 just until November 6th or the day after or -- well,  
22 hopefully we know, but just which way we're going.

23 THE COURT: You should probably stop talking now.  
24 No, I'm just kidding.

25 Okay. Let me ask you a couple questions that

1 might help with that set of questions.

2 MR. PLADSON: Sure.

3 THE COURT: Do you believe that discovery is  
4 required in this case?

5 MR. PLADSON: I do.

6 THE COURT: Okay. Judge Wright is the magistrate  
7 judge in this case, and it is my intention to send the  
8 parties to Judge Wright to talk about what the next steps  
9 are. What discovery is needed, what schedule is  
10 appropriate, and when and how to tee this up for ultimate  
11 ruling. I know that plaintiffs are eager for summary  
12 judgment. I'm going to allow Judge Wright to grapple with  
13 those questions in the first instance.

14 I think as a practical matter, you know, November  
15 6th is right around the corner, and so depending on where  
16 Judge Wright goes with those considerations, we may be  
17 worrying about a tempest in a teapot prematurely.

18 MR. PLADSON: That's fine. I just kind of wanted  
19 to flag that.

20 The other piece, too, is that my understanding is  
21 that my clients have an immediate right to appeal the  
22 sovereign immunity denial. I haven't talked to them yet. I  
23 will be following up. But that may -- also just for  
24 pragmatic reasons, and I will let them know if we end up  
25 going that route because it's an immunity question and --

1 THE COURT: Yeah, I kind of lost sight of that.  
2 Okay. Well, I hope I explained myself well enough for  
3 appeal purposes.

4 MR. PLADSON: We'll be getting a transcript. I've  
5 got to get a contract in place first because it's  
6 government. Anyway, so I wanted to flag that as well.

7 THE COURT: Okay. And can you give me just a  
8 thumbnail sketch -- I'm trying to resist my old magistrate  
9 judge inclinations and not wonder about the discovery -- but  
10 what kind of discovery do you think is necessary?

11 MR. PLADSON: I think we need to know what the  
12 threat is, how do they understand the law, and why do they  
13 think that there's chill here? It's a retaliation statute.  
14 If you don't fire somebody for attending, then you have no  
15 issue. And it doesn't prohibit speech. We don't have to  
16 get into the dispute or the merits but --

17 THE COURT: But that's merits-related discovery.

18 MR. PLADSON: Yes.

19 THE COURT: Okay.

20 MR. PLADSON: So I think there's that. I think we  
21 may look at retaining an expert or two.

22 THE COURT: Great. Thank you.

23 Mr. Revnew?

24 MR. REVNEW: Thank you, Your Honor. No surprise,  
25 we do not want any delay here. We do not believe discovery

1 is necessary. Certainly if the defendants have an appeal  
2 right, they have the appeal right. They also, if they don't  
3 appeal, they have the duty to answer the complaint, I  
4 believe it's within 14 days at this point. I just want to  
5 make that clear for purposes of the record.

6 THE COURT: Okay. So you disagree that discovery  
7 is necessary. If they choose to exercise their right to  
8 appeal, they do so. You would presumably bring up your  
9 thoughts about whether any discovery is needed at that  
10 pretrial conference before Judge Wright?

11 MR. REVNEW: Yes, Your Honor. And I know you're  
12 delegating it to the magistrate judge, but I would be remiss  
13 if I didn't raise that we do not believe that discovery is  
14 necessary. We believe this is a pure legal issue, and we  
15 believe the Court should decide that pure legal issue as  
16 expeditiously as possible because we are talking about a  
17 First Amendment issue.

18 THE COURT: Great. Thank you.

19 MR. REVNEW: Thank you.

20 THE COURT: All right. So I will wait with bated  
21 breath to see if there's going to be an appeal or not.

22 I'm going to connect with Judge Wright and let her  
23 know this will be coming her way and that the plaintiffs are  
24 looking for some speedy action. And then at her discretion  
25 in terms of this schedule -- and I'm sure she'll be

1 consulting with me about -- you know, my general practice,  
2 is not to allow early summary judgment. My general  
3 practice, though, is to encourage people to expedite  
4 discovery to facilitate early summary judgment where that's  
5 appropriate, and I'll let her sort through those things with  
6 counsel for both sides.

7 Thank you for an excellent argument, again, and  
8 for answering all my questions, again.

9 In terms of your question about what happens if  
10 your client changes, I think we cross that bridge when we  
11 come to it. So if you file a motion, we'll see what happens  
12 with it, and who knows where the case will be at that point.

13 Thank you.

14 (Court adjourned at 3:02 p.m.)

15 \* \* \*

16  
17  
18 I, Paula K. Richter, certify that the foregoing is  
19 a correct transcript from the record of proceedings in the  
20 above-entitled matter.

21  
22 Certified by: s/ Paula K. Richter

23 Paula K. Richter, RMR-CRR-CRC  
24  
25